(3)

No. 03-439

Supreme Court, U.S.
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In The

Supreme Court of the United States

Jonathan L. Haas,
Petitioner,

v.

United States Department of Veterans' Affairs,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

Jonathan L. Haas
In propria persona
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STATEMENT OF THE CASE AND FACTS

The Department of Veterans' Affairs (VA) states, "The VA regional office concluded that petitioner was not entitled to the presumption that he was exposed to herbicides during his service in the Republic of Vietnam." [Brief in Opposition, p. 2]

The VA further states, "The regional office also found that there was no direct evidence that he was actually exposed to herbicides during his service." [Brief in Opposition, p. 4] The VA fails to reveal the rest of the story.

Petitioner, upon reading this conclusion of the hearing officer, realized that the hearing officer had failed to obtain and review the logs of the ship in which Petitioner had served, which would show the proximity to the coast the ship was operating and that the ship was engulfed in clouds of herbicides which were being sprayed over the trees on the beach. Petitioner, therefore, filed a Request for Decision Review Officer dated August 19, 2002, which stated in pertinent part that "he was exposed to agent orange being sprayed by aircraft on coastal jungles while his ship was in the coastal waters of Vietnam." [VA File No. 24 699 165], attached to Motion to Show Cause at App. 46-92 He attached a sworn affidavit describing this experience. [Id. at 90-92] [See Appendix F attached hereto] The Affidavit of Petitioner was not contradicted or opposed by credible evidence, and, therefore established that Petitioner was exposed to herbicide Agent Orange. [Doctrine of Reasonable Doubt, 38 C.F.R. Section 3.102] These decisions are contrary to

the law. [See 38 U.S.C. Section 1154(b)]

The evidence established that Petitioner was actually exposed to agent orange and was entitled to the presumption of exposure to agent orange. This is not in dispute. What is in dispute under the VA regulations, is, did Petitioner actually serve in the Republic of Vietnam? This is clearly set forth in the VA decision dated May 8, 2002.

> Until such time as we hear otherwise, the General Counsel September 1996 opinion to the effect service in Vietnam actually means having set foot on shore is still for application and service connection for diabetes and its manifestations must therefore be denied. Since herbicide exposure is not automatically presumed for veterans who served off shore, the veteran needs to furnish evidence he was actually exposed to Agent Orange in service.

[VA File No. 24 699 165], attached to Motion to Show Cause at App. 39. See Pet., pp. 11-13 for full text of Opinion.

ARGUMENT

The VA states, "[28 U.S.C.] Section 1654 provides that, '[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel.' But Section 1654 conditions that general authorization on 'the rules of such courts' governing the

'manage[ment] and conduct [of] causes therein. [Brief in Opposition, p. 5]

The VA misconstrues the meaning of the statute. The latter portion of the statute refers to the courts regulation of admission of attorneys to practice before the courts. It does not authorize the courts to restrict by rule *pro se* representation. "This authority includes the regulation of admissions to its own bar." Frazier v. Heebe, 482 U.S. 641, 645, 107 S.Ct. 2607, 2611 (1987)

Also, the argument of the VA relating to Rules 23 and 24 [Brief in Opposition, pp. 5-6] premised on this misconstrued meaning of Section 1654 must fail.

The VA suggests that Rule 23(c)(2) overrules 28 U.S.C. 1654. [Brief in Opposition, p. 6, n. 2] It is Hornbook law that statutes prevail over rules of court which may be in conflict.

The VA argues that Petitioner was represented by class counsel and any motions must be made through class counsel. [Brief in Opposition, pp. 7-8] Petitioner did request class counsel to represent him.

> Plaintiff attempted to obtain representation by the attorneys that represented the plaintiffs in the original action [Nehmer v. United States Veterans' Administration, 118 F.R.D. 113 (1987) and Nehmer v. United States Veterans' Administration, 712 F.Supp. 1404 (1989)]. Linda S. Peterson was not willing to represent new members of the plaintiff class and plaintiff was unable to locate Barton F. Stichman.

[Motion to Show Cause [Contempt], p. 1, Footnote 1]

Petitioner was represented by class counsel during the adjudication phase of the case, but Petitioner was abandoned by class counsel during the enforcement phase.

The VA argues: "[T]he proper course was for petitioner to seek leave to intervene in the action to present his individualized grievance." [Brief in Opposition, p. 8] Intervention was not appropriate because the judgment in the case had been final for several years. Intervention is defined: "The act by which a third party demands to be received as a party in a suit pending between other persons." [Black's Law Dictionary, 4th Ed., 1951, p. 956] This case was not "pending." A final decision was entered by Stipulation and Order several years ago. Petitioner's interests were adequately represented by the named plaintiffs. Petitioner's Motion was for enforcement, not adjudication.

The VA cites the recent case of Devlin v. Scardelletti, 536 U.S. 1, 122 S.Ct. 2005 (2002), which relates to a nonnamed class member appealing the settlement where he had objected at the fairness hearing. [Brief in Opposition, pp. 9-10] In this case no fairness hearing was conducted by the trial court. However, this court held in Devlin:

> We hold that nonnamed class members like petitioner who have objected in a timely manner to approval of the settlement at the fairness hearing have the power to bring an appeal without first intervening.

536 U.S. at 14, 122 S.Ct. at 2013.

Herein, there was no fairness hearing, but Petitioner did object by filing his contempt motion. Petitioner should, likewise, have the power to appeal without first intervening.

The VA argues that Petitioner must first exhaust all administrative remedies. [Brief in Opposition, p. 13] The law does not require Petitioner to do that which is futile. The VA medical records of Petitioner will confirm that Petitioner will probably not survive this lengthy administrative review process; Petitioner's kidneys functioning at only 30 percent due to Agent Orange poisoning.

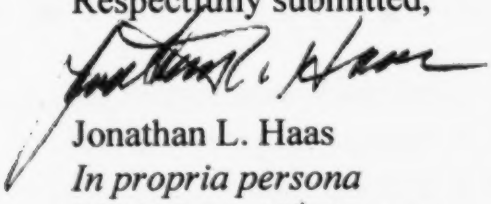
CONCLUSION

Petitioner has a Sixth Amendment constitutional due process right to his day in court. He has a statutory right to represent himself under 28 U.S.C. § 1654. The Appeals' Court has jurisdiction to enforce such statutory right.

Other Naval veterans of the Vietnam War, similarly situated, having served aboard Naval ships in the coastal waters of Vietnam, will likewise be denied their medical and financial benefits authorized by Congress, unless these issues are addressed by the Court.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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December 3, 2003.

AFFIDAVIT OF JONATHAN HAAS, COMMANDER, USNR, RETIRED

STATE OF ARIZONA)
) ss.
County of Maricopa)

JONATHAN L. HAAS, upon his oath, deposes and says:

1. That he served on active duty in the United States Navy onboard the USS Mount Katmai (AE-16) in the coastal waters of the Republic of Vietnam during four campaigns of the Vietnam War.

2. That while in the coastal waters of the Republic of Vietnam rearming and resupplying United States Army, Navy and Coast Guard vessels, United States aircraft were performing aerial application of defoliates on the costal jungles.

3. That large clouds of defoliates formed over the tops of the trees and were blown out to sea enveloping Commander Haas' ship.

4. The ship was operating about 100 feet off the coast.

5. That the chemicals permeated the air, contacting Commander Haas' skin, and were breathed into the lungs of Commander Haas.

6. That the chemicals were identified to Commander Haas by United States Army personnel embarked on the ship as the defoliant "Agent Orange."

7. That while serving onboard the USS Mount Katmai he was hospitalized at the United States Naval Hospital, Subic Bay, P.I., and diagnosed as having gout.

/s/ Jonathan L. Haas
JONATHAN L. HAAS
Commander, USNR, Ret.

Signed and sworn to before me this 19th day of August, 2002, by Jonathan L. Haas.

(Seal) /s/ Kimberly Rose Rodriquez
Notary Public

KIMBERLY ROSE RODRIQUEZ
NOTARY PUBLIC, STATE OF ARIZONA
COMMISSION # 81659
MARICOPA COUNTY
COMMISSION EXPIRES FEB. 24, 2003